

THE RELEVANCE OF THE KENYAN COURTS IN ATTAINING SUSTAINABLE DEVELOPMENT AND COMBATting INDUSTRIAL POLLUTION

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Declaration

I, IVY MUTHONI MIRICHO, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

MR. DESMOND TUTU

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ABSTRACT

Industrial pollution is a global problem which Kenya is grappling with. It causes detrimental effects to the environment and is hazardous to human health. Kenya's progress lies in industrial development but industrialisation causes environmental damage. This puts Kenya at a cross roads between advancing economic growth and development or environmental protection. Stopping industrial production altogether would affect economic growth adversely and at the same time allowing industries to pollute will cause environmental damage causing its instability. A balance between industrial development and environmental protection is necessary. Sustainable development is seen as the better solution to both and is one of Kenya's goals to achieve both environmental protection and economic development. By curbing industrial pollution, Kenya will eventually attain sustainable development.

Despite the enactment of various legislations, Kenya is still struggling with industrial pollution. Courts of law in many jurisdictions are avenues for seeking justice to those who are aggrieved or unsatisfied by other institutions. The Judiciary is a key player in environmental protection. This study aims at looking at the various laws on Kenyan courts and explores the role of the courts in solving industrial pollution. The study will also examine the relevance of the courts in combatting industrial pollution and what makes it an amenable avenue for combatting industrial pollution and attaining sustainable development.

LIST OF CASES

Waweru v Republic (2004) KLR (Environment and Land)

Gabčíkovo-Nagymaros Project (Hungary v Slovakia), ICJ Reports 25th September 1997

Minors Oposa v Secretary of the Department of Environmental and Natural Resources 33 ILM 173 (1994)

Shell Petroleum Development Company Ltd v Councillor FB Farah and others (1995) 3 NWLR 148

MC Mehta v Union of India and others 1988 AIR 1115, SCR (2) 530

Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996)

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
EMCA	Environmental Management and Coordination Act
ELC	Environment and Land Court
NEMA	National Environment Management Agency
UN ENVIRONMENT	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
RMA	Resource Management Act

CHAPTER ONE

INTRODUCTION

1.1 Background

Sustainable Development was defined by the Brundtland Commission as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹ Sustainable development involves the correlation between the social, environmental and economic areas of human existence.² It means attaining a standard of living that can be preserved for many generations, maintaining the long-term viability of supporting ecosystems.³

Human activities have led to the deterioration of ecosystems and diminishing natural resources.⁴ Environmental degradation is among the most consequential threats to the world’s stability and security. Decisive action is necessary to avoid future catastrophic conflicts.⁵ Kenya is developing rapidly and with more development comes further environmental degradation. Whilst development is important particularly for a developing state like Kenya, environmental protection is vital and necessary for the survival of our generation and future generations. Development efforts should be pursued regarding and employing environmentally safe practices to attain sustainable development. Industrial activities have traditionally been considered the main contributor to environmental pollution.⁶ Industrial pollution is one of the major environmental challenges faced by Kenya and it affects

¹ The World Commission on Environment and Development, *Our common future*, Oxford, 1987.

² Dernbach JC, Mintz JA, ‘Environmental laws and sustainability: An introduction’ *Open Access Sustainability* (2011), 3.

³ IUCN-World Conservation Union, ‘Guide to preparing and implementing national sustainable development strategies and other multi-sectoral environment and development strategies’ IUCN’s Commission on Environmental Strategies Working Group on Strategies for Sustainability (1993).

⁴ Millenium Ecosystem Assessment, *Ecosystems and human wellbeing: General synthesis* 1 Four main findings 2005.

⁵ High level panel on threats, challenges and change, *A more secure world: Our shared responsibility* UN Doc A/59/565 (December 2, 2004) at <http://www.un.org/secureworld/> on 3 February 2017.

⁶ <http://www.mfa.gov.il/mfa/pressroom/1996/pages/sustainable%20industrial%20development.aspx> on 3 February 2017.

Kenyans' survival.⁷ Deadly gases and toxic chemical wastes emanating from industrial production pose a serious threat to human development.⁸

Kenya in trying to address industrial pollution enacted the EMCA, which is the primary environmental legislation as well as the Environmental Management and Co-ordination (Waste Management) Regulations which deals with all categories of waste and provides guidelines on the management of waste including industrial wastes.

Courts are paramount in enhancement and interpretation of environmental law. Pre-Constitution of Kenya 2010, land and environment matters were dealt with by the land and environment division, established at the High Court and in Magistrates' Court levels.⁹ Non-specialised courts have been doubted in terms of how they approach environmental disputes, speed, expertise of the judges and quality of judgments which have affected the development and access to environmental justice.¹⁰ The rationale for constitutional and statutory recognition of specialised environment courts was to improve access to justice, expertise and efficiency, clear and effective jurisprudence and faster and efficient disposal of environmental litigation.¹¹ The judiciary is now composed of the Supreme Court, which is the highest court on the land, the Court of Appeal, the High Court and Subordinate Courts.¹² The 2010 Constitution established the ELCs, which are accorded the same status as a high court and have the jurisdiction to hear and determine disputes relating to the environment and the use, occupation of, and title to, land.¹³ It was created to improve access to environmental justice through sound and quality judgment from competent and well-versed judges in matters environment, faster determination of cases and effective jurisprudence.¹⁴ The judiciary throughout the years has made decisions showing a progressive nature of environmental justice. Domestication of international environmental treaties further shows

⁷ Mbote PK, Odote C, 'Courts as champions of sustainable development lessons from East Africa' *Sustainable Development Law & Policy* (2009), 83-84.

⁸ Haque MS, 'Environmental discourse and sustainable development: Linkages and limitations' *Ethics and the Environment* (2000), 5.

⁹ www.judiciary.go.ke/news_info/view_article.php?id=408673 on 5 March 2017.

¹⁰ Sharma R, 'Green courts in India: Strengthening environmental governance?' *Law, Environment and Development Journal*, (2008), 50.

¹¹ Sharma R, 'Green courts in India: Strengthening environmental governance?'.

¹² <http://www.gabriellubale.com/courts-system-in-kenya/> on 3 February 2017.

¹³ Article 162(2)(b), *The Constitution of Kenya* (2010)

¹⁴ Otieno N, 'Appraising specialised environment courts in the attainment of environmental justice: The Kenyan experience' University of Nairobi, August 2014.

the growth in the role of the judiciary in environmental protection.¹⁵ The landmark decision on matters sustainable development in Kenya was in *Waweru v Republic*¹⁶ where the court held that development that jeopardises life is not sustainable development and ought to be halted. The ELC has an opportunity to apply the principle of sustainable development as expressed in Article 10(2) (d) of the Constitution. However, more jurisprudence is needed to achieve sustainable development and adequately deal with industrial pollution. In the *Case Concerning the Gabčíkovo- Nagymaros Project*, Judge Weeramantry expressed that the principle of sustainable development constitutes a principle which enables the balancing between environmental concerns and development concerns. He added that sustainable development was an erga omnes obligation.¹⁷

1.2 Statement of the Problem

Kenya is experiencing increasing levels of environmental depletion and industrial pollution posing a threat to the society.¹⁸ Many nations, including developing ones, have basic environmental protection laws in place, but an enormous gap exists between the letter of the law and what is actually happening on the ground.”¹⁹ Kenya has enacted various laws to deal with the problem of industrial pollution. Despite the presence of the EMCA and judicial intervention, industrial pollution is still persistent. Drawing from the background above, this study will address the relevance of courts in attaining sustainable development with regards to combatting industrial pollution.

Environmental protection is still suffering in most of the world due to poor implementation of environmental law. As a result, the organisations of the courts and their environmental sensibility, as well as the national systems of access to justice, have become crucial issues in the implementation of both environmental law and the principle of sustainable development.²⁰

15 Mbote PK, ‘Kenya (Role of the judiciary in environmental governance)’ LJ Kotze & AR Paterson, *The role of the judiciary in environmental governance: Comparative perspectives* (2009), 451-78.

16 (2004) eKLR (Environment and Land).

17 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997.

18 Failler P, Seide W, ‘Assessment of the environment pollution and its impact on economic cooperation and integration initiatives of the IGAD Region’ (2016).

19 Stein P, ‘Why judges are essential to the rule of law and environmental protection, in judges and the rule of law: Creating the links: Environment, human rights and poverty’ 57 *Thomas Breiber* (2006).

20 Amirante D, ‘Environmental courts in comparative perspective: Preliminary reflections on the national green tribunal of India’ 29 *Pace Environmental Law Review* (2012).

1.3 Justification of the Study

There is a need for addressing the issue of industrial pollution to attain sustainable development. The Judiciary plays a critical role in addressing industrial pollution and in the development and implementation of legislative and institutional regimes for sustainable development.²¹ Attaining sustainable development leads to ecologically sound environments which are vital to the survival of the society.²²

The main aim of this research is to address the relevance of Kenyan courts in attaining sustainable development by combatting industrial pollution.

The research aims at directly contributing to the discussion on the attainment of sustainable development and environmental protection at large.

1.4 Research Objectives

The overall objective of this study is to evaluate whether the courts are adequately equipped to deal with the issue of industrial pollution and as a result attain sustainable development.

The study therefore seeks:

- i. To investigate the role of the court in tackling industrial pollution
- ii. To examine the court's relevance in attaining sustainable development

1.5 Research Questions

This study seeks to address the following questions:

- i. What is the role of courts in attaining sustainable development?
- ii. What is the regulatory framework for industrial pollution control in Kenya?
- iii. Has the court efficiently tackled industrial pollution?

1.6 Literature Review

A large number of harmful chemicals are emitted into the air every year²³ that are directly detrimental to human health, and thus, to sustainability.

21 Kaniaru D, Kururkulasuriya L and Okidi C, "UNEP Judicial symposium on the role of the Judiciary in promoting sustainable development", The fifth international conference on environmental compliance and enforcement in Monterey, California, November 1998.

22 Morris, J, *Sustainable development: Promoting progress or perpetuating poverty?* Profile Books, London, 2002, 255.

23 Postel S, *Controlling toxic chemicals' In state of the World*, WW Norton, New York, 1988, 119.

Beder S²⁴ believes future generations might benefit from economic development however those gains might be more offset by environmental deterioration. According to Markowitz and Gerardu, sustainable development depends upon good governance; good governance depends upon the rule of law, and the rule of law depends upon effective compliance and enforcement.²⁵ This quote demonstrates that, for a law's objective to be fully achieved, compliance and enforcement are required. It is, therefore, necessary for the judiciary to be well-equipped in order to ensure that there is compliance or non-compliance with the law. An environmental court may be one possible way in which to ensure that environmental law is correctly applied.²⁶

Courts are crucial in the implementation of environmental law and sustainable development.²⁷ The 2002 Johannesburg Principles on the Role of Law and Sustainable Development emphasised that an independent judiciary and judicial process is necessary for the implementation, development, and enforcement of environmental law.²⁸ The Johannesburg Principles also acknowledge that the fragile state of the global environment requires the Judiciary as the guardian of the rule of law to boldly and fearlessly implement and enforce applicable international and national laws.²⁹ Independent judiciaries should ensure that the rights and interests of succeeding generations are not compromised. World judges at the Earth Summit at Johannesburg presented a declaration on the implementation of sustainable development. In the declaration, they envisioned the Rio principles of sustainable development as an action plan to strengthen the development, use, and enforcement of environmentally related laws.³⁰ The participants at the symposium observed that the judiciary is a crucial partner in bringing about a judicious balance between environmental and developmental concerns and thereby promoting sustainable development through their decisions.³¹

²⁴ Beder S, 'Costing the earth: Equity, sustainable development and environmental economics', 4 *New Zealand Journal of Environmental Law* (2000), 227-243.

²⁵ Markowitz KJ, Gerardu JJA, 'The importance of the Judiciary in environmental compliance and enforcement' 29 *Pace Environmental Law Review* (2012), 540- 41.

²⁶ Chohan I, 'Environmental courts: An analysis of their viability in South Africa with particular reference to the Hermanus environmental court' LLM Thesis, University of KwaZulu-Natal, December 2013.

²⁷ Amirante D, 'Environmental courts in comparative perspective: Preliminary reflections on the National Green Tribunal of India'.

²⁸ Johannesburg principles on the role of law and sustainable development, *Journal of Environmental Law* 2002.

²⁹ Johannesburg principles on the role of law and sustainable development.

³⁰ 'Summit: Judges fortify environmental law principles', *Environmental News Service*, 28 August 2002.

³¹ Toepfer K, 'Background paper to the global judges' symposium'.

Mbote PK and Odote C state that the judiciary plays an important role as it enables states to solve controversies between the state itself and its subjects as they balance competing interests of persons and entities. The judiciary is, therefore, best placed to ensure sustainable development is attained.³² Toepfer K³³ opines that a judiciary well informed of environmental law and law in the field of sustainable development and sensitive to their role in promoting the rule of law can play a critical role in the vindication of the public interest in a healthy and secure environment through the interpretation, enhancement, and enforcement of environmental law. The judiciary is a critical partner in promoting environmental governance, upholding the rule of law and ensuring a fair balance between environmental, social and developmental consideration through its judgments and declarations.³⁴ Sinha GN³⁵ writes that courts make a significant contribution to the protection of the environment because they enrich the understanding of environmental legislation through creative interpretation.

Justice Isagani in *Minors Oposa v Secretary of the Department of Environmental and Natural Resources*³⁶ is of the view that judiciaries are the central agency of horizontal accountability in society. That is to mean that judiciaries have the capacity to check abuses by other governmental institutions, state agencies, and branches of government. Kaniaru D, Kurukulasuriya and Okidi C³⁷ opine that judiciaries have, and will continue to play a vital role in development and implementation of legislative and institutional regimes for sustainable development. In *Waweru v Republic*, the court further stated that in the case of land resources, forests, wetlands and waterways, the government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean and healthy environment.³⁸ Judge Weeramantry expressed in his introduction to the UN Environment Judicial Handbook on Environmental Law that, “the judiciary is one of the most valued and respected institutions in all societies. The tone that the judiciary sets through the tenor of its decisions influences societal attitudes and reactions towards the matter in question.” This is all the more so in a

³² Mbote PK, Odote C, 'Courts as champions of sustainable development: Lessons from East Africa'.

³³ Toepfer K, 'Background Paper to the global judges' symposium'.

³⁴ UNEP Global judges programme 2005.

³⁵ Sinha G N, 'A comparative study of the environmental laws of India and the UK with special reference to their enforcement' LLM Thesis, The University of Birmingham, August 2003.

³⁶ 33 ILM 173 (1994) (Philippines).

³⁷ Kaniaru D, Kurukulasuriya L and Okidi C, 'UNEP Judicial symposium on the role of the Judiciary in promoting sustainable development'.

³⁸ (2004) eKLR (Environment and Land).

new and rapidly developing area. Judicial decisions and attitudes can also play a great part in influencing society's perception of the environmental danger and of the resources available to society with which to contain it.³⁹

1.7 Theoretical Framework

This study will be guided by the Public Trust theory and the Theory of Justice. Joseph Sax' theory of Public Trust discusses the concepts of sustainable management of natural resources and the role of the courts' in protecting the public trust. This theory argues that natural resources are limited resources and should be held in trust for present and future generations.⁴⁰ This research concludes that the courts role is to protect society's interest in the public trust by keeping the government in check. The study is also based on the theory of justice by John Rawls. He notes that theories of justice are concerned with the proper way to structure government and society.⁴¹ For him, justice is the structural rules of society within which people with different sets of values and goals in life can coexist, cooperate, and even compete. He writes that rules are requisite for people to work together to create social and individual goods within society. This research argues that environmental justice must be boldly interpreted and enforced by the courts to be able to attain sustainable development and combat industrial pollution.

1.8 Hypotheses

This research will test whether there is a link between industrial pollution control and sustainable development and whether courts are key players in solving the industrial pollution problem and in attaining sustainable development.

1.9 Research Design and Methodology

The method used to gather information for this research will be desk research. The research will analyse existing literature on the research subject. The internet and other electronic sources will be very useful throughout the different levels of the study.

39 Shelton D, Kiss A, 'Judicial handbook on environmental law' *United Nations Environment Programme* (2005).

40 Sax J, 'The public trust doctrine in natural resource law: Effective judicial intervention' 68 *Michigan Law Review*, (1969), 47.

41 Rawls J, *A Theory of Justice* Harvard University Press, Cambridge, 1971.

This study will also employ the **comparative study method** to undertake the research. It will compare the practices, procedures, and structure of the courts in Kenya and New Zealand's Environment Court.

1.10 Limitations

The main limitation of this study is of an informational nature. The research will require an analysis of information which might be limited. Accessing information will require effort and time in order to adjust it as per the study.

As the study is reliant on secondary sources, the information gathered will be limited to what authors and scholars have written about rather than actual insight from the field.

1.11 Chapter Breakdown

The study is divided into the following chapters:

CHAPTER ONE: INTRODUCTION

It will include the Introduction. This will include the research proposal which will discuss the background of the issues, the problem and theories to be used in the study as well as a discussion of the literature used.

CHAPTER TWO: THEORETICAL FRAMEWORK

This Chapter encompasses the theoretical framework. It will discuss the public trust theory and the theory of justice and fairness and their relevance to the courts in attaining sustainable development.

CHAPTER THREE: LEGAL FRAMEWORK

This Chapter will entail a discussion on the legal, regulatory and institutional framework on the courts and sustainable development.

CHAPTER FOUR: AN ANALYSIS OF THE ENVIRONMENT COURT OF NEW ZEALAND

This Chapter will analyse the Environment Court of New Zealand comparing it with the Environment and Land Court of Kenya. From this, the expectation is that the research will lead to the conclusion that, courts champion the protection of the environment and attain sustainable development.

CHAPTER FIVE: FINDINGS AND RECOMMENDATIONS AND CONCLUSIONS

This Chapter will contain a summary of the findings, conclusions and recommendations gathered from the research.

BIBLIOGRAPHY

This section will contain the Bibliography.

CHAPTER TWO

2.1 Introduction

The discussion on the role of courts in the development and implementation of legislative and institutional regimes for sustainable development was tackled in the first chapter which established that courts have a crucial function to play in attaining sustainable development. The need for addressing industrial pollution to attain sustainable development was also discussed at length. Attaining sustainable development would lead to ecologically sound environments which are highly important in ensuring the survival of the society.

This chapter analyses the theories relied on to explain the relevance of the courts in combatting industrial pollution and attaining sustainable development. The study discusses the public trust theory and the theory of justice and fairness. Joseph Sax's theory of Public Trust is relevant to this research as it discusses the concepts of sustainable management of natural resources and the role of the courts in protecting the public trust. This theory argues that natural resources are limited resources and should be held in trust for present and future generations.⁴² The theory of justice and fairness proposed by John Rawls, which aims to describe a just order of the major political and social institutions of a liberal society, will also be discussed.⁴³ The theory of justice and fairness is highly relevant to this study as it explains concepts of fairness and justice as well as the court's role in ensuring justice for the society.

2.2 Public Trust Theory

The public trust doctrine is a common law property doctrine rooted in **both** Roman law.⁴⁴ The doctrine protects the land of communal value in perpetuity for free and unimpeded access by the public under a trust held by the sovereign.⁴⁵ It recognises that some natural resources are so important to the society and to human survival that they should not be in exclusive private ownership.⁴⁶ This theory is relevant to the study as it discusses concepts of environmental

⁴² Sax J, 'The public trust doctrine in natural resource law: Effective judicial intervention'.

⁴³ <https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc> on 12th September 2017.

⁴⁴ Dowie M, 'Salmon and the Caesar: Will a doctrine from the Roman Empire sink ocean aquaculture?' *Legal Affairs* (2004).

⁴⁵ Babcock HM, 'Has the US Supreme Court finally drained the swamp of Takings jurisprudence? The impact of *Lucas v South Carolina Coastal Council* on wetlands and coastal barrier beaches', 19 *Harvard Environmental Law Review*, (1995), 1.

⁴⁶ Wood MC, 'Nature's Trust: Environmental law for a new ecological age' *Cambridge University Press* (2013).

protection as well as sustainability.⁴⁷ Joseph Sax, the major proponent of this theory argues that a nation's natural resources are limited commodities which, if consumed too quickly, will not be available to later generations; therefore, the current generation should regard itself as trustees who hold these precious goods for the benefit of all.⁴⁸ Therefore, current generations should utilise natural resources and set aside some for future generations. The trust approach places responsibility for the protection of natural resources in the hands of individuals who are the trustees, who share society's ideas, beliefs and understandings and are likely to provide for protection for the environment.⁴⁹ Natural resources should be regarded as goods held in common and the government must assume a fiduciary duty not to waste them.⁵⁰ Further, the state must take into account future users who will be harmed if society depletes or damages the environment in irreversible ways.⁵¹ The approach places protection of the environment in the hands of a trustee, generally some agent of the sovereign, who is given a set of instructions and told to protect the environment accordingly.⁵² This theory advocates for sustainable development as public resources are held in common for the use of present and future generations.

The role of the public trust doctrine is to protect the public interest from shortcomings of the democratic process.⁵³ Under the public trust doctrine, courts place checks on the other branches of government.⁵⁴ When the legislature or an administrative agency fails to fully consider the public interest in making a decision that affects a trust resource or engages in questionable governmental conduct, the doctrine provides a mechanism by which the courts may intervene to protect the resource.⁵⁵ States are obliged to prevent substantial damage of public resources. Following this approach, states should not allow private activities that will prejudice the public's sovereign interest without a compelling government public purpose.⁵⁶ To fulfil this duty, the government must consider the adverse impacts of a proposed action on trust resources to determine whether these activities would cause significant impairment of

⁴⁷ Musiker DG, France T, Hallenbeck LA, 'The public trust and parens patriae doctrines: Protecting wildlife in uncertain political times' 16 *Public Land and Resources Review* (1995), 87-96.

⁴⁸ Sax J, 'The Public trust doctrine in natural resource law: Effective judicial intervention', 484- 90.

⁴⁹ Delgado R, 'Our better natures: A revisionist view of Joseph Sax's public trust theory of environmental protection, and some dark thoughts on the possibility of law reform' 44 *Vanderbilt Law Review* (1991).

⁵⁰ Sax J, 'The Public trust doctrine in natural resource law: Effective judicial intervention', 553- 57.

⁵¹ Sax J, *Mountains without Handrails*, The University of Michigan Press, Michigan, 1980.

⁵² Bogert G, *Trusts*, 6ed, West Academic, Minnesota, 1987.

⁵³ Sax J, 'The Public trust doctrine in natural resource law: Effective judicial intervention', 521.

⁵⁴ Sax J, 'The Public trust doctrine in natural resource law: Effective judicial intervention', 495- 96.

⁵⁵ Sax J, 'The Public trust doctrine in natural resource law: Effective judicial intervention', 491.

⁵⁶ *Illinois Central Railroad v Illinois* 455-456.

the trust resource.⁵⁷ From this point of view, states have a duty to protect public resources from impairment and the court can intervene whenever the State fails to protect the Sovereign interest.

Central to the public trust is recognition that the conflict is between the survival of a society's common natural resources and individual economic interests.⁵⁸ Critics such as Professor Huffman argue that the conflict arising from the doctrine is between 'public recreational rights' and private property.⁵⁹ One of the major reasons for the resistance of the public trust theory is that it causes unexpected economic losses for private property rights.⁶⁰ The public trust standard of non-impairment is similar to preserving the sustainability of a given natural resource.⁶¹ Professor Wood, another proponent of the theory suggests that the doctrine is nothing more than "the basic fiduciary duty to maintain an asset's ability to provide a steady abundance of environmental services for future generations."⁶² Professor Huffman also argues that judicial intervention to limit the legislative and executive branches of government or to impose limits on private individuals in the name of the public trust doctrine is against the rule of law and history.⁶³ Courts have invoked the doctrine in particular situations to question the validity of executive agency action that threatened trust resources and, in particular, public access to those resources.⁶⁴ Critics argue that today's environmental issues are often so exceedingly complex that the judicial role must be limited and reliance on administrative agencies must be great.⁶⁵

Administrative agencies enjoy a vast discretion which they abuse to serve corporate and bureaucratic interests.⁶⁶ Courts should thus presume the decision making discretion they have

⁵⁷ Illinois Central Railroad v Illinois 456.

⁵⁸ Huffman JL, 'Avoiding the takings clause through the myth of public rights: The public trust and reserved rights doctrines at work', 3 *Journal Land Use & Environmental Law* (1987), 171.

⁵⁹ Huffman JL, 'Avoiding the takings clause through the myth of public rights: The public trust and reserved rights doctrines at work'.

⁶⁰ Plater ZJB, *Environmental law and policy: Nature, law, and society*, 4ed, Aspen Publishers, 1992, 405-406.

⁶¹ Musiker DG, France T, Hallenbeck LA, 'The public trust and parens patriae doctrines: Protecting wildlife in uncertain political times' 16 *Public Land and Resources Review* (1995), 87-96.

⁶² Wood MC, 'Protecting the wildlife trust: A reinterpretation of Section 7 of the Endangered Species Act', 34 *Environmental Law* (2004), 95.

⁶³ Huffman JL, 'Avoiding the takings clause through the myth of public rights: The public trust and reserved rights doctrines at work', 3 *Journal Land Use & Environmental Law* (1987), 171.

⁶⁴ Butler WA, Cameron RA, Review of Sax J, 'Defending the environment: A strategy for citizen action' (1971), 1 *Ecology Law Quarterly* 231 (1971).

⁶⁵ Butler WA, Cameron RA, Review of Sax J, 'Defending the environment: A strategy for citizen action'.

⁶⁶ <http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine> on 18th December 2017.

to enforce the doctrine and oblige the government to carry out its obligation to serve the public's interests and to ensure sustainability of natural resources.⁶⁷

This theory can be used to protect natural resources and the environment. Doing so will provide protection for natural resources in situations where other branches of the government cannot or will not act. The doctrine allows courts to enforce the people's sovereign interests.⁶⁸ Moreover, this principle has the potential to create a new dialogue in the area of environmental law.⁶⁹ The public trust doctrine can still play an important role in ensuring judicial review of actions that threaten natural resources and the environment where an environmental statute does not apply or is not being enforced, or where state constitutional provisions to protect natural resources do not exist or are ineffective.⁷⁰

The public trust doctrine is applicable in Kenya. In *Waweru v Republic*, the court recognised the doctrine's applicability and held that the government and its agencies are to manage land resources, forests, waterways and wetlands in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment.⁷¹

2.3 Justice as Fairness

John Rawls, the proponent of this theory aims to describe a just order of the major political and social institutions of a liberal society.⁷² This theory is relevant to this study as it discusses the concepts of fairness and justice for the common good.⁷³ Justice as fairness is constructed around particular interpretations of the ideas that citizens are free and equal and that society should be fair.⁷⁴ Rawls argues that justice is the first value of social institutions thus an injustice is only tolerable when it is necessary to avoid a greater injustice. This could happen in instances where agencies and corporations pollute the air in the quest to serve individual and corporate interests. The theory posits an initial position of equality which is "designed to

⁶⁷<http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine> on 18th December 2017.

⁶⁸<http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine> on 18th December 2017.

⁶⁹<http://www.bollier.org/blog/mary-wood%E2%80%99s-crusade-reinvigorate-public-trust-doctrine> on 18th December 2017.

⁷⁰ Klass AB, 'Modern public trust principles: Recognizing rights and integrating standards' 82 *Notre Dame Law Review* (2006), 699.

⁷¹ (2006) eKLR.

⁷² <https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc> on 12th September 2017.

⁷³ <https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc> on 12th September 2017.

⁷⁴ <https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc> on 12th September 2017.

lead to an original agreement on principles of justice."⁷⁵ To institutionalise this, he formulated two guiding principles of justice as fairness.⁷⁶

The first principle states that every person has an inalienable claim to equal basic liberties compatible with the same scheme of liberties for all.⁷⁷ It asserts that all citizens should have the familiar basic rights and liberties such as freedom of conscience and freedom of association, liberty of the person, the rights to vote, to hold public office and to be treated in accordance with the rule of law. The first principle grants these rights and liberties to all citizens equally. The basic rights and equal liberties of persons are given priority over economic policy and they must not be traded off against other social goods.⁷⁸ Rawls requires that citizens should be both formally and substantively equal.⁷⁹ The second principle of justice as fairness states that social and economic inequalities are to satisfy two conditions.⁸⁰ Fair equality of opportunity and the difference principle. Applying this theory in Kenya would mean that the right to a clean and healthy environment would be given priority over economic growth and development.

Rawls tasks courts with defending a higher law based upon principles of justice that make up the overlapping consensus. According to Rawls, the court has two important roles; being the defender of a higher law and the second is an educative task that is, the court helps form basic assumptions regarding society to citizens.⁸¹ The Court, as the epitome of public reason, gives life to the principles that should bind a people.⁸² The justice-as-fairness approach provides a useful framework for courts seeking just outcomes.⁸³ Justice is served through a process which bases the probable cause determination on the balancing of personal and societal interests in a way that seeks to maximise the common good.⁸⁴ Judges may thus find that their opinions stand the test of time by applying the veil of ignorance and principles of justice

⁷⁵ Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 3.

⁷⁶ Rawls J, *A theory of justice*, 15.

⁷⁷ Rawls J, *Justice as fairness: A restatement*, 2ed, Harvard University Press, Cambridge, 2001.

⁷⁸ <https://plato.stanford.edu/entries/rawls/#WorRawCitEnt> on 12 September 2017.

⁷⁹ Rawls J, *Justice as fairness: A restatement*, 44.

⁸⁰ Rawls J, *Justice as fairness: A restatement*.

⁸¹ Foss JC, 'John Rawls and the Supreme Court: A study in continuity and change' PhD Thesis, Baylor University, May 2011.

⁸² Freeman S, 'Constitutional democracy and the legitimacy of judicial review' 9 *Law and Philosophy*, (1991), 327.

⁸³ Antkowiak B A, 'Saving probable cause' 40 *Suffolk University Law Review* (2007), 599.

⁸⁴ Lawrence M A, 'Justice-as-fairness as judicial guiding principle: Remembering John Rawls and the Warren Court' 81 *Brooklyn Law Review* (2016), 673.

analysis.⁸⁵ This approach would enable the judiciary to impartially address the social and political realities of the twenty-first century such as environmental concerns.⁸⁶ The theory creates a possibility to devise an improved approach to judicial decision-making that would better serve Kenya's core principles of liberty and equal justice for all.

Some critics argue that Rawls's vision is too limited as it cannot be assumed that individuals are not amoral or inevitably selfish. They argue that the possibility of a just and peaceful future is mythical. Rawls addresses this through what he calls a realistic utopia, that by showing how the social world may realise the features of such a world it provides a long-term goal of political endeavour.⁸⁷ Some view Rawl's theory as addressing a very limited question. The principles of justice were intended by him to apply primarily to a well-ordered society. He failed to address how social institutions should remedy injustices of the past, and what should be done when people live under unjust arrangements.⁸⁸ Amartya Sen⁸⁹ criticises this theory by stating that ideas about a perfectly just world do not help reduce actual existing inequality. He also adds that Rawls emphasises on the notion of institutions as guarantors of justice, failing to consider that human behaviour may affect institutions' ability to maintain a just society.

This theory can be applied by courts in solving environmental disputes. By using the hypothetical veil of ignorance, judges are better placed to decide cases fairly, expending justice to the parties. As defenders of higher law and society's educators, courts have a big task in distributing justice through decisions they make. Fair decisions as per this theory would have a ripple effect setting effective environmental precedents and principles for application by present and future generations. By so doing, the judiciary is collectively able to combat issues such as industrial pollution and as a result, attain sustainable development.

⁸⁵ Antkowiak B A, 'Saving probable cause', 605-06.

⁸⁶ Lawrence M A, 'Justice-as-fairness as judicial guiding principle: Remembering John Rawls and the Warren Court'.

⁸⁷ <https://plato.stanford.edu/entries/rawls/#ConCit> on 13th September 2017.

⁸⁸ Føllesdal A, 'John Rawls' Theory of justice as fairness' PluriCourts Research Paper (2014), 14-18.

⁸⁹ Amartya S, 'The idea of justice' Harvard University Press (2009), 52-74.

CHAPTER THREE

AN ANALYSIS OF THE LEGISLATIVE AND REGULATORY FRAMEWORK

3.1 Introduction

This chapter discusses the legal, regulatory and institutional framework. This involves examining the current regulatory framework on Kenyan Courts, sustainable development and industrial pollution in Kenya and the adequacy of the regulatory framework in Kenya.

The judiciary is tasked with implementation of the law in Kenya.⁹⁰ The law in itself is the best way to deal with environmental problems.⁹¹ It does this by creating the machinery, or procedures for implementing the policy choices.⁹² In this context, the law provides policies and legislation that will regulate and maintain the stability of the natural resources and ecosystems. The law remains the most effective means for translating sustainable development policies into actions.⁹³ The law establishes a framework of rules and procedures designed to guide action for resolving environmental problems as well as preventing adverse changes.⁹⁴

3.2 National Legal Framework

The Constitution of Kenya 2010

Kenya's commitment to the protection of the environment is shown in the preamble of the Constitution, which states that Kenya is respectful of the environment as its heritage and is determined to sustain it for the benefit of future generations.⁹⁵ The right to a clean and healthy environment is enshrined under Article 42,⁹⁶ which includes the right to have the environment protected for the benefit of present and future generations and the right to have environmental obligations fulfilled.⁹⁷

⁹⁰ International Records Management Trust, *Managing records as reliable evidence for ICT/ E-Government and freedom of information, Kenya court case study*, August 2011.

⁹¹ Ebeku K, 'Judicial contributions to sustainable development in developing countries: An overview' 15 *Environmental Law and Management*, 13 (2003), 168-74.

⁹² Ojwang JB, 'Environmental law and political change in Kenya' 1 *Ecopolity Series* (1991), 9.

⁹³ Ebeku K, 'Judicial contributions to sustainable development in developing countries: An overview'.

⁹⁴ Dyrecek J, *Rational Ecology: Environmental and Political Economy*, 1ed, Blackwell Publishing, Oxford, 1987, 137.

⁹⁵ Preamble, *Constitution of Kenya* (2010).

⁹⁶ Article 42, *Constitution of Kenya* (2010); Section 3(1), *Environmental Management and Coordination Act* (Cap 387 2012).

⁹⁷ Article 42(a), *Constitution of Kenya* (2010).

The Constitution dedicates a whole chapter to Land on Environment.⁹⁸ Chapter Five on Land and Environment gives principles of land policy. The state is obliged to ensure sustainable exploitation utilisation, management and conservation of the environment and natural resources.⁹⁹ The state acknowledges the importance of sustainable use and exploitation of land, a positive move toward combatting industrial pollution.

Where a person alleges that their right to a clean and healthy environment has been or is being denied, violated, infringed or threatened, the person may apply to the Environment and Land court for redress.¹⁰⁰ In such an instance, the court may make orders or give directions to prevent, stop or discontinue any act or omission that is harmful to the environment, compel any public officer to take measures to prevent or discontinue such act or omission or provide compensation for any victim of a violation of the right to a clean and healthy environment.¹⁰¹ An applicant in such a case does not have to demonstrate that any person has incurred loss or suffered injury.¹⁰² The Constitution provides for the establishment of superior courts with the status of the high court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of and title to land.¹⁰³ The ELC may adopt and promote alternative dispute resolution mechanisms.¹⁰⁴ However, the use of these mechanisms should not be contrary to the Bill of Rights, should not be repugnant to justice and morality and should not be inconsistent with the Constitution or other written law.¹⁰⁵ Establishment of the Environment and Land Court shows Kenya's commitment to environmental protection.

The Constitution enjoins the ELC to be guided by several constitutional principles in exercising its judicial authority.¹⁰⁶ One of the principles supposed to guide the court is sustainable development.¹⁰⁷ The importance of sustainable development is emphasised in the Constitution which lists it as a national value and principle of governance.¹⁰⁸ By making

⁹⁸ Chapter 5, *Constitution of Kenya* (2010).

⁹⁹ Article 69(1)(a), *Constitution of Kenya* (2010).

¹⁰⁰ Article 70(1), *Constitution of Kenya* (2010).

¹⁰¹ Article 70(2), *Constitution of Kenya* (2010).

¹⁰² Article 70(3), *Constitution of Kenya* (2010).

¹⁰³ Article 162(2), *Constitution of Kenya* (2010).

¹⁰⁴ Article 159 (2)(c), *Constitution of Kenya* (2010).

¹⁰⁵ Article 159(3), *Constitution of Kenya* (2010)

¹⁰⁶ Article 159(2), *Constitution of Kenya* (2010)

¹⁰⁷ Article 10 (2) (d), *Constitution of Kenya* (2010)

¹⁰⁸ Article 10 (2) (d), *Constitution of Kenya* (2010)

sustainable development a constitutional principle, Kenya is making great strides in achieving sustainable development.

Courts are relevant institutions in the attainment of sustainable development as they are supposed to incorporate the principle in decision making.

The Environment and Land Court Act

The Environment and Land Court Act was enacted pursuant to Article 162(2) (b) of the Constitution of Kenya 2010.¹⁰⁹ The overriding objective of the Act is the facilitation of the just, expeditious, proportionate and accessible resolution of land and environmental disputes.¹¹⁰

The Act establishes the ELC, granting it jurisdiction to hear disputes related to the environment and land including disputes: relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management, choses in action or other instruments granting any enforceable interests in land.¹¹¹ The act lists qualifications of appointment of judges of the court which emphasise on competence, knowledge, and experience in matters relating to environment and land in addition to being a legal practitioner.¹¹² Part III of the Act sets out the court's jurisdiction as being original, appellate and supervisory.¹¹³ There is enhanced jurisdiction of the Environment and Land Court to even deal with constitutional issues arising out of the environment as the subject matter of litigation.¹¹⁴ The court is mandated to issue a range of orders and reliefs.¹¹⁵ Appeals from the court are taken to the Court of Appeal.¹¹⁶

The ELC is guided by the principles of sustainable development¹¹⁷ and it is not bound by procedural technicalities¹¹⁸ so as to ensure efficient and expedient justice for persons. It may also employ alternative dispute resolution mechanisms as per the Constitution.¹¹⁹

¹⁰⁹ Section 4(2), *Environment and Land Court Act* (No. 19 of 2011)

¹¹⁰ Section 3, *Environment and Land Court Act* (No. 19 of 2011)

¹¹¹ Section 13, *Environment and Land Court Act* (No. 19 of 2011).

¹¹² Section 7, *Environment and Land Court Act* (No. 19 of 2011).

¹¹³ Section 13(1), *Environment and Land Court Act* (No. 19 of 2011).

¹¹⁴ Section 13(3), *Environment and Land Court Act* (No. 19 of 2011).

¹¹⁵ Section 13(7), *Environment and Land Court Act* (No. 19 of 2011).

¹¹⁶ Section 16, *Environment and Land Court Act* (No. 19 of 2011).

¹¹⁷ Section 18(a)(i), *Environment and Land Court Act* (No. 19 of 2011).

It should be noted that before the promulgation of the Constitution of Kenya 2010, environmental matters were within the jurisdiction of the high courts. As a result, the Environment and Land Courts have little jurisprudence in the area of industrial pollution. Under the previous Constitution (now repealed) there were no specialised courts to deal with environmental matters.¹²⁰ The new constitutional and statutory regime with regard to the specialised environment court is taking a right step towards attaining sustainable development and environmental justice as a whole.

Environmental Management and Co-ordination Act (EMCA)

This is Kenya's principal legislation on the environment. The Act recognises every person's right to a clean and healthy environment and that every person has a duty to safeguard and enhance the environment.¹²¹

The EMCA establishes the National Environmental Management Authority (NEMA)¹²² which is responsible for exercising general supervision and coordination over matters involving the environment. It is the government's principal instrument in the implementation of environmental policies.¹²³ NEMA is in charge of monitoring the environment and its protection as well as preventing degradation of the environment.¹²⁴ EMCA defines sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.¹²⁵ In Kenya, principles of sustainable development have found expression in the EMCA and they include: the principle of international cooperation, the principle of inter-generational equity and sustainable utilization, the polluter pays principle and the precautionary principle.¹²⁶ These principles

¹¹⁸ Section 19(1), *Environment and Land Court Act* (No. 19 of 2011).

¹¹⁹ Section 20(1), *Environment and Land Court Act* (No. 19 of 2011).

¹²⁰ Section 60, *Constitution of Kenya (Repealed)* (1963).

¹²¹ Section 3(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹²² Section 7, *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹²³ Section 9(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹²⁴ Section 9(2), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹²⁵ Section 2, *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹²⁶ Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012); Section 18, *Environment and Land Court Act* (No. 19 of 2011).

should guide all decisions made in administrative and judicial domains on matters related to environment and natural resources to ensure sustainable development.¹²⁷

The act makes it an offence to discharge any dangerous materials into land, air, water or aquatic environment, to pollute the environment and to discharge any pollutant to the environment.¹²⁸ Persons who contravene these provisions commit an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings.¹²⁹ The court may also direct such persons to pay the full cost of cleaning up the polluted area and removing the pollution or to clean up the polluted environment and remove the effects of pollution.¹³⁰ EMCA relies on judicial review for its control of the activities of NEMA.

Environmental Management and Co-ordination (Air Quality) Regulations

As prescribed by EMCA, the Standards and Enforcement Review Committee in consultation with the relevant lead agencies¹³¹ came up with the Environmental Management and Co-ordination (Air Quality) Regulations to provide for the prevention, control and diminishing of air pollution to ensure clean and healthy air.¹³² Part II of the Regulations points out general prohibitions. Persons are prohibited from acting in a way that directly or indirectly causes or is likely to cause air pollution. The Regulations put emission standards and prohibit a person or facility to cause emission of air pollutants in excess of the limits stipulated in the Third Schedule of the Regulations.¹³³ The Authority is empowered to carry out monitoring of ambient air quality or request a relevant lead agency to do so on its behalf.¹³⁴ It is an offence to contravene the provisions of the Regulations and persons who do are liable on conviction imprisonment or a fine as provided by the act.¹³⁵ The Authority may also charge penalties of ten thousand shillings for every parameter not being complied with, per day to persons who fail to comply with standards set out in the Regulations until such persons demonstrate full compliance.¹³⁶

¹²⁷ Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012); Section 18, *Environment and Land Court Act* (No. 19 of 2011).

¹²⁸ Section 142(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹²⁹ Section 142(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹³⁰ Section 142(2), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹³¹ Section 78(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹³² Rule 3, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).

¹³³ Rule 15, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).

¹³⁴ Rule 58, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).

¹³⁵ Rule 76, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).

¹³⁶ Rule 77, *The Environmental Management and Co-ordination (Air Quality) Regulations* (2009).

Waste Management Regulations oblige every industrial undertaking to mitigate pollution by installing anti-pollution technology for the treatment of wastes emanating from the industry.¹³⁷

3.3 International Legal Framework

Environmental issues are of a global nature therefore, they require global cooperation between states.¹³⁸ States have over time developed legal regimes to address environmental issues and their impacts such as climate change.¹³⁹ Kenya acknowledges the importance of international law rules which are now sources of Kenyan law by virtue of the constitution.¹⁴⁰ General rules of international law form part of Kenyan laws.

International Laws

Kenya is a signatory to, and has ratified the African Charter on Human and Peoples Rights.¹⁴¹ Article 24 of the charter grants all people the right to a general satisfactory environment favourable to their development. Article 26 obliges states to guarantee the independence of courts and to allow the establishment and improvement of appropriate national institutions entrusted with the protection of the rights and freedoms guaranteed by the charter.

The 1972 Stockholm Declaration on Human Environment contains principle 21 which provides that states have the responsibility to ensure activities within their jurisdiction or control do not cause damage to the environment of other states.¹⁴² Principle 2 of the Stockholm Declaration posits that the environmental policies of states should enhance the present and future development potential of developing countries and they should not hamper the attainment of better living conditions for all persons.¹⁴³ By using these principles as a guide in the judicial process, the court can attain sustainable development.

¹³⁷ Rule 17, *Environmental Management and Co-ordination (Waste Management) Regulations* (2006).

¹³⁸ http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-73292015000100191 on 18th January 2018.

¹³⁹ Otieno N, 'Appraising specialised environment courts in the attainment of environmental justice: The Kenyan experience' University of Nairobi, August 2014.

¹⁴⁰ Article 2(5), *Constitution of Kenya* (2010).

¹⁴¹ *African (Banjul) Charter on Human and Peoples' Rights*, 27 June 1981, No. 26363.

¹⁴² McEldowney JF, McEldowney S, 'Environment and the Law: An introduction for environmental scientists and lawyers' *Pearson Longman Publishing* (1996), 37.

¹⁴³ UNGA, *United Nations Conference on the Human Environment* (Stockholm Declaration), UN A/RES/2994 (June 16 1972).

The Brundtland Report (Our Common Future),¹⁴⁴ published by the World Commission on Environment and Development, stated that critical global environmental problems were as a result of the enormous poverty of developing states and the non-sustainable patterns of consumption and production in developed countries.¹⁴⁵ It called for a strategy that united development and the environment which was referred to as sustainable development.¹⁴⁶

On a recommendation by the World Commission on Environment and Development, the United Nations General Assembly held The United Nations Conference on the Environment and Development (also known as the Earth Summit) in 1992 in Rio de Janeiro, Brazil.¹⁴⁷ Five documents enunciating the concept of ecologically sustainable development and recommending a programme of action for the implementation of the concept were signed at the Conference. They were: The Rio Declaration on Environment and Development; Agenda 21; The Convention on Biological Diversity; The Framework Convention on Climate Change; and The Statement of Forest Principles.¹⁴⁸

The Rio Declaration on Environment and Development¹⁴⁹

The Rio Declaration comprises of 27 Principles which have had a significant impact on the development of philosophy and law in the environmental field.¹⁵⁰ Many of the principles have been incorporated into global and regional treaties, in soft law instruments and some have been included in national constitutions and statutes in states such as Kenya.¹⁵¹ These principles should guide all decisions made in administrative and judicial domains on matters related to environment and natural resources to ensure sustainable development. The Rio Declaration states at that, “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹⁵²

¹⁴⁴ The World Commission on Environment and Development, *Our common future*.

¹⁴⁵ The World Commission on Environment and Development, *Our common future*.

¹⁴⁶ <https://www.are.admin.ch/are/en/home/sustainabledevelopment/internationalcooperation/2030agenda/un-milestones-in-sustainable-development/1987--brundtland-report.html> on 18th January 2018.

¹⁴⁷ Boer B, ‘The globalisation of environmental law: The role of the United Nations’ 20 *Melbourne University Law Review* (1995), 101.

¹⁴⁸ Sands P, *Principles of International Environmental Law*, 2ed, Cambridge University Press, Cambridge, 2003, 52 – 53.

¹⁴⁹ UNGA, *Report of the United Nations Conference on Environment and Development* (Rio Declaration on Environment and Development), UN A/CONF.151/26 (August 12 1992).

¹⁵⁰ UNGA, *Rio Declaration On Environment And Development*.

¹⁵¹ Section 3(5), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹⁵² Principle 1, UNGA, *Rio Declaration on Environment and Development*.
<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> on 5 February 2017.

Principle 3 states that “the right to development must be fulfilled to equitably meet developmental and environmental needs of present and future generations.” The concept of sustainable development in the Rio Declaration emphasises upon human needs as their developmental needs in accordance with nature. Principle 4 of the Rio Declaration states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.¹⁵³ To achieve sustainable development environmental protection should constitute an integral part of the development process and should not be considered in isolation from it.¹⁵⁴

Agenda 21

Agenda 21 is the programme of action for sustainable development.¹⁵⁵ It is in this respect that Agenda 21¹⁵⁶ lays emphasis on governments’ responsibilities to involve their publics at large, and particular groups, in their environmental protection programmes. Although Agenda 21 itself is not legally binding, its elaboration of sustainability in its comprehensive principles constitutes a background for the development of new rules setting out enforceable standards for permissible environmental conduct.¹⁵⁷

The United Nations Framework Convention on Climate Change (UNFCCC) recognises that states have the right to sustainable development and encourages them to promote sustainable development.¹⁵⁸

The Aarhus Convention¹⁵⁹ is an environmental treaty which is directed mainly at those states forming part of the United Nations Economic Commission for Europe;¹⁶⁰ however, it is open for ratification by other states.¹⁶¹ The Convention seeks to address three areas: access to information,¹⁶² public participation in decision-making,¹⁶³ and access to justice.¹⁶⁴ These

¹⁵³ *Rio Declaration on Environment and Development* (1992).

¹⁵⁴ *Rio Declaration on Environment And Development* (1992).

¹⁵⁵ <http://www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf> on 18th December 2017.

¹⁵⁶ <https://sustainabledevelopment.un.org/outcomedocuments/agenda21> on 18th December 2017.

¹⁵⁷ Odhiambo M, ‘The role of courts in environmental management: The case of Kenya’ LLM Thesis, The University of Nairobi, July 2003.

¹⁵⁸ Article 3(4), *United Nations Framework Convention on Climate Change* (May 9 1992) FCCC/INFORMAL/84.

¹⁵⁹ *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention), 25 June 1998, 37770.

¹⁶⁰ Preamble and Article 17, *Aarhus Convention*.

¹⁶¹ Article 19(3), *Aarhus Convention*.

¹⁶² Article 4, *Aarhus Convention*.

three core areas are reiterated in the Rio Declaration and Kenyan Constitution 2010. They are vital in the court process as efficient and expedient court processes promote environmental justice.

3.4 Institutional Framework

EMCA establishes the National Environment Tribunal¹⁶⁵ which is not bound by the rules of evidence.¹⁶⁶ It makes inquiries into matters forwarded to it from the Authority and makes awards, orders, and decisions.¹⁶⁷ Persons aggrieved by decisions or orders given by the Tribunal may appeal to the High Court within thirty days of the decision.¹⁶⁸ The Tribunal and the Environment and Land Court both deal with industrial pollution cases, the former dealing with matters arising from decisions of the authority and the latter having original and appellate jurisdiction over environmental matters.

The Judiciary, which is comprised of courts, has the power and function to interpret and apply the laws of the country, to adjudicate and make the final determination on questions of a civil, criminal and admiralty nature. Because of this function, the Judiciary is referred to as the custodian of justice. It is the final arbiter in all matters touching and concerning the exercise of power, the protection of legal rights and the enforcement of duty.¹⁶⁹

Before the promulgation of the Constitution of Kenya 2010, environmental matters in Kenya were left to the private law realm.¹⁷⁰ Environmental cases were based on Common law under causes of action in tort such as nuisance, trespass, and negligence; remedies available were certiorari, prohibition, mandamus and declaration.¹⁷¹ Procedurally, access to environmental justice was limited due to the narrow interpretation of locus standi as aggrieved persons had to prove injury.¹⁷² One could not institute claims on behalf of others or a group. Parameters of

¹⁶³ Article 6, *Aarhus Convention*.

¹⁶⁴ Article 9, *Aarhus Convention*.

¹⁶⁵ Section 125(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹⁶⁶ Section 126(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹⁶⁷ Section 126(2), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹⁶⁸ Section 129(1), *Environmental Management and Co-ordination Act* (Cap 387 2012).

¹⁶⁹ Kuloba R, *Courts of Justice in Kenya*, Oxford University Press, Nairobi, 1997.

¹⁷⁰ Odhiambo M, 'The role of courts in environmental management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.

¹⁷¹ Odhiambo M, 'The role of courts in environmental management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.

¹⁷² Odhiambo M, 'The role of courts in environmental management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.

common law were too limiting for environmental cases thus leading to the development of environmental rights in the Constitution.

Currently, environmental protection is catered to in the Constitution and enabling legislation. Rules of locus standi are now more flexible and applicants do not have to demonstrate that they have incurred loss or suffered injury.¹⁷³ A new structure of courts was created by the Constitution of Kenya (2010). It divides courts into two; Superior courts and Subordinate Courts. Superior courts consist of the Supreme Court, the Court of Appeal and High courts. Subordinate courts include the Magistrates courts; the Kadhis' courts, the Court Martial and any other court or tribunal established by any legislation.¹⁷⁴

The Supreme Court is the highest court of the land and its decisions bind all courts.¹⁷⁵ It has appellate jurisdiction to hear appeals from the Court of Appeal and any other court or tribunal prescribed by national legislation.¹⁷⁶ Appeals from the Court of Appeal can be on cases involving interpretation of the Constitution or any other case in which both the Supreme Court and Court of Appeal certify to be a matter of general public importance.¹⁷⁷ The Court may also give an advisory opinion when requested by the national government, any county government or any state organ with respect to matters concerning county government.¹⁷⁸

Article 164 of the Constitution establishes the Court of Appeal.¹⁷⁹ The court has jurisdiction to hear and determine appeals from the High Court and any other court or tribunal whose appeals lie to the Court of Appeal.¹⁸⁰

High Courts are established by Article 165 of the Constitution. The Court has unlimited original jurisdiction to hear both civil and criminal matters, jurisdiction to determine whether fundamental rights under the Bill of Rights have been infringed, threatened or violated, jurisdiction to hear appeals from tribunals regarding appointment or removal of officials, jurisdiction in matters regarding interpretation of the Constitution and supervisory jurisdiction over subordinate courts.¹⁸¹

¹⁷³ Article 70(2) (a), *Constitution of Kenya* (2010).

¹⁷⁴ Article 169(1), *Constitution of Kenya* (2010)

¹⁷⁵ Article 163(7), *Constitution of Kenya* (2010).

¹⁷⁶ Article 163(3)(b), *Constitution of Kenya* (2010).

¹⁷⁷ Article 163(4), *Constitution of Kenya* (2010),

¹⁷⁸ Article 163(6), *Constitution of Kenya* (2010).

¹⁷⁹ Article 164(1), *Constitution of Kenya* (2010).

¹⁸⁰ Section 3(1), *Appellate Jurisdiction Act* (Act No. 12 2012).

¹⁸¹ Article 165, *Constitution of Kenya* (2010).

Magistrates' courts have jurisdiction to hear both criminal¹⁸² and civil matters.¹⁸³ The Courts are also empowered to hear environment and land matters.¹⁸⁴ This position however changed as the Court of Appeal in *Malindi Law Society v Attorney General & 4 others* held that Section 26 of the ELC Act was unconstitutional and the conferment of jurisdiction to deal with land and environment matters to Magistrates' Courts is inconsistent with the Constitution.¹⁸⁵ Jurisdiction to hear and determine land and environment matters is limited to the ELC. Following the court of Appeal's decision, the Supreme Court ruled that judges of the ELC can only handle environment and land court matters as Article 162 of the Constitution was designed to separate the High Court from specialised Labour and Environment and Land courts.¹⁸⁶

3.5 Case Law

Courts have exercised their role in environmental protection by delivering decisions that promote sustainable development in several jurisdictions as discussed below.

The court in *Waweru v Republic*¹⁸⁷ acknowledged the importance of sustainable development and said that the government through its ministries and agencies is obliged by law to approve sustainable development. In *MC Mehta v Union of India and others*,¹⁸⁸ on the petition of a citizen, tanneries were restrained from disposing effluents into the River Ganges. In reaching its decision, the court relied on article 48A of the Indian constitution which enjoins the state to protect and improve the environment and article 51A which imposes the duty on every citizen to protect the environment. The court also relied on the Stockholm Declaration.¹⁸⁹ Another judicial contribution in the field of sustainable development is in the celebrated decision of the supreme court of Philippines in *Minors Oposa v Secretary of the Department of Environmental and Natural Resources*,¹⁹⁰ where 45 children (represented by their guardians ad litem) instituted a representative action against the government's granting of timber licence agreements beyond the sustainable capacity of the forest. This action was on

¹⁸² Section 6, *Magistrates' Courts Act* (Cap 10 2015).

¹⁸³ Section 7, *Magistrates' Courts Act* (Cap 10 2015).

¹⁸⁴ Section 26, *Environment and Land Court Act* (No. 19 of 2011).

¹⁸⁵ (2016) eKLR.

¹⁸⁶ <https://www.businessdailyafrica.com/analysis/Will-Supreme-Court-ruling-end-turf-wars-/539548-3965758-pd4m1kz/index.html> on 24th January 2018.

¹⁸⁷ (2006) eKLR.

¹⁸⁸ 1988 AIR 1115, SCR (2) 530 (India).

¹⁸⁹ Stockholm Declaration.

¹⁹⁰ 33 ILM 173 (1994) (Philippines).

their behalf and on behalf of future generations. The defendants challenged the standing of the plaintiffs in bringing the action for themselves and for future generations. The court ruled against the objection of the defendants and held that the agreements were contrary to the concept of sustainable development as recognised by the constitutional right to a balanced and healthy environment. In *Shell v Farah*,¹⁹¹ the Nigerian Court of Appeal awarded compensation to victims of oil-related environmental damage and ordered for the rehabilitation of damaged land. This decision was influenced by the ideas of sustainable development despite there not being reference to any constitutional provision, statute or treaty dealing with the right to environment and sustainable development. The order for rehabilitation of the damaged land protects the interests of present and future generations in line with the concept of sustainable development. In the celebrated *Gabcikovo Nagymaros* case,¹⁹² Judge Weeramantry noted that the principles of international law, the right to development and the right to environmental protection are likely to conflict in their application with each other unless courts could identify and apply a principle of reconciliation. The court took the opportunity to reaffirm its statements that the environment ‘is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations yet unborn’; and that the ‘general obligation to ensure that activities within their jurisdiction and control respect the environment of others states or areas beyond national control is now part of the corpus of the international law of the environment’.¹⁹³ Sustainable development provides the basis of reconciling these potentially conflicting principles; a mediating principle which aids judicial decisions and provides scope for progressive legal development.

Pending in court is a decision that will create precedence on industrial pollution cases in Kenya. The Centre for Environmental Justice and Action sued the Metal Refineries Export Processing Zone Kenya on behalf of members of the Owino- Uhuru community in Mombasa who are victims of lead poisoning as a result of lead-laden fumes and waste from the refinery.¹⁹⁴ Members of this community have suffered a great deal due to lead poisoning, the most common effects being death, skin problems, brain damage, miscarriages and blood

¹⁹¹ *Shell Petroleum Development Company Ltd v Councillor FB Farah and others* (1995) 3 NWLR 148 (Nigeria).

¹⁹² *Gabcikovo-Nagymaros Project*.

¹⁹³ Legality of the threat or use of nuclear weapons, Advisory Opinion, ICJ Reports (1996), 29.

¹⁹⁴ <https://www.nation.co.ke/counties/mombasa/Mombasa-Owino-Uhuru-residents-Nema-report-impact-lead-poisoning/1954178-4300862-k53semz/index.html> on 11 February 2018.

disorders and are seeking compensation.¹⁹⁵ The court's determination of this matter is highly important as the court will determine the state's role in protecting its people and the environment, the place of environmental rights and treatment of pollutants.¹⁹⁶

These decisions show the attitude of judiciaries in the implementation of sustainable and generally in the protection of the environment as interpreters of national and international laws. By applying the guiding principles of sustainable development in rendering decisions, judges contribute largely to the promotion and enforcement of the principle of sustainable development.¹⁹⁷

3.6 Conclusion

From the aforementioned, it is evident that Kenya has an extensive framework which provides for the protection of the environment, sustainable development, role of the judiciary in attaining sustainable development as well as sanctions available to polluters and remedies available to victims. Kenya has adopted institutional and effective legislative mechanisms to protect the environment. The discussion also sheds light on the Environment and Land Court and its functions. The Constitution addresses environmental protection and sustainable development at large. This chapter also discusses a number of international instruments most of which uphold the principle of sustainable development. The principle's importance is emphasised in the instruments and the problem of industrial pollution can be solved by incorporation of sustainable development in legislation and judicial processes. It is in implementation of the law that the law becomes an effective means of translating sustainable development policies into action.¹⁹⁸

The judiciary's role in pollution and natural resource management is secondary to that of executive and administrative agencies. Although secondary, the role of the judiciary is significant enforcing compliance with rules and standards. Because courts are final arbiters of actions to enforce environmental laws they can be instrumental in promoting compliance. Courts also are often given the role of reviewing the legality of decisions made by

¹⁹⁵ Okeyo B, Wangila A, 'Lead poisoning in Owino Uhuru slums in Mombasa- Kenya' *Eco- Ethics International* (2012).

¹⁹⁶ <https://centerforjgea.com/advocacy2.php> on 11 February 2018.

¹⁹⁷ Ebeku K, 'Judicial contributions to sustainable development in developing countries: An overview'.

¹⁹⁸ Ebeku K, 'Judicial contributions to sustainable development in developing countries: An overview'.

administrative agencies. Thus, the judiciary has a crucial and unique role in the management of pollution ensuring that it operates under the rule of law.¹⁹⁹

¹⁹⁹<http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/244351-1279901011064/GuidanceNoteonRoleofJudiciary.pdf> on 18th January 2018.

CHAPTER FOUR

AN ANALYSIS OF NEW ZEALAND'S ENVIRONMENT COURT

2.1 Introduction

The previous chapter dealt with the legal and regulatory framework governing the courts in Kenya. Kenya has a multitude of laws regarding sustainable development and industrial pollution. There are also institutions created to deal with environmental matters such as the courts, the National Environmental Authority and The National Environmental Tribunal. The chapter established that despite having numerous laws, implementation and enforcement are the major issues. The discussion concluded that incorporation of sustainable development in decision making would ultimately combat industrial pollution and lead to the attainment of sustainable development. This chapter analyses the Environmental Court of New Zealand, its history and its role in solving environmental disputes.

An increasing pollution problem mainly ascribed to development and industrialisation²⁰⁰ in Kenya led to the enactment of the EMCA and recognition of environmental rights in the Constitution of Kenya 2010. Further, Kenya established the Environment and Land Court to deal with matters relating to land and the environment. New Zealand was among the first countries in the world to institute a specialised environmental court thus has had a lot experience in the area of environmental adjudication.²⁰¹ The New Zealand Environment Court is one of the oldest environment courts in the world and continues to provide, a model for other jurisdictions to examine.²⁰² The court is also renowned for incorporating sustainable development principle in its workings, entitling it as the adjudicator of sustainability. It is for these reasons that this study chooses to focus on New Zealand's experience to determine whether Kenyan courts are relevant in addressing industrial pollution and attaining sustainable development. This analysis is worth undertaking as Kenya requires knowledge on how the environment and land court can attain sustainable development.

A fundamental difference between the two systems is in the structure of the courts. In New Zealand, courts are divided into two; courts of general jurisdiction and specialised courts and

²⁰⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4012528/> on 18th January 2018.

²⁰¹ Warnock C, 'Reconceptualising the role of the New Zealand environment court' *Journal of Environmental Law*, 26 (2014), 507–518.

²⁰² Pring G, Pring C, 'Greening justice: Creating and improving environmental courts and tribunals' *World Resources Institute* (2009).

tribunals.²⁰³ Courts of general jurisdiction include the Supreme Court which is the highest court in the land, the Court of Appeal, the High courts and district courts.²⁰⁴ Outside the pyramid for courts of general jurisdiction are specialist courts and tribunals. These include the Employment Court, the Environment Court, the Māori Land Court, the Waitangi Tribunal, Coroners Courts, the Courts-Martial Appeal Authority and others. Appeals from specialised courts and tribunals are taken to courts of general jurisdiction.²⁰⁵ For example appeals from the Environment are taken to the High Court.²⁰⁶

Kenya's court system is divided into two; superior courts and subordinate courts. Superior courts consist of the Supreme Court which is the highest court in the land, the Court of Appeal and the High Courts. Subordinate courts consist of Magistrate courts.

2.2 Brief History of the Courts

New Zealand was the first country in the world to adopt an environmental management strategy based on sustainability.²⁰⁷ Prior to enactment of the Resource Management Act (RMA) in 1991, New Zealand's environmental management approach was a reflection of the country's emphasis on economic growth and emphasis on private property rights.²⁰⁸ By the early 1970s, an extensive bureaucracy of government departments evolved that focused heavily on resource development.²⁰⁹ These departments were largely focused on development, barely focusing on coordinated planning or analysing the environmental impact of their activities.²¹⁰ Policies adopted at the time focused on the exploitation of natural resources.²¹¹ Despite the central government's historical support for economic development and resource utilization, by the early 1980s, New Zealand had enacted a number of statutes to address environmental and natural resource issues.²¹²

²⁰³ <https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system> on 18th January 2018.

²⁰⁴ <https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system> on 18th January 2018.

²⁰⁵ <https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system/diagram> on 18th January 2018.

²⁰⁶ Section 299, *Resource Management Act* (1991) (New Zealand).

²⁰⁷ Birdsong BC, 'Adjudicating sustainability: New Zealand's environmental court', 29 *Ecology Law Quarterly* (2002).

²⁰⁸ Birdsong BC, 'Adjudicating sustainability: New Zealand's environmental court', 29 *Ecology Law Quarterly* 26-27.

²⁰⁹ Memon PA, 'Keeping New Zealand green: Recent environmental reforms' 31 *University of Otago Press* (1993), 26-27.

²¹⁰ Birdsong BC, 'Adjudicating sustainability: New Zealand's environmental court', 7.

²¹¹ Smith I, 'The state of New Zealand's environment' *GP Publications* (1997).

²¹² Birdsong BC, 'Adjudicating sustainability: New Zealand's environmental court', 8.

Similarly, before the enactment of the EMCA in 1999, Kenya lacked a comprehensive environmental regulatory legislation.²¹³ New Zealand had numerous statutes, policies, and institutions which had no unifying principle.²¹⁴ By the 1980s, environmental problems were gaining global attention which led to conversations on the need to address these issues. Various forums were held such as the World Conservation Strategy endorsed by New Zealand's government²¹⁵ in 1980 and later the Brundtland Commission advocated the concept of sustainability as a vital principle in environmental policy.²¹⁶ It was the workings of these groups that substantially informed New Zealand's emphasis on sustainable development in the Resource Management Act.

The RMA replaced sixty distinct environmental laws with a comprehensive law created to promote the sustainable management of physical and natural resources. The act is anchored on three essential policy themes; sustainable management, effects-based management, and public participation and the policy instruments that implement these themes.²¹⁷ The RMA governs the management of all land, air, and water by regulating the impacts of human activities on the environment and operating to allocate natural resources to various uses.²¹⁸ The New Zealand Environment Court was established under the RMA.²¹⁹

The New Zealand Environment Court is a court of record as well as a court of expertise. It has two forms of specialisation; the judiciary and lay commissioners with expert knowledge, and the two forms work together. The environmental court reviews every important mechanism for environmental management including regional policy instruments, regional and district plans. The Court exercises its authority under the RMA in three areas; the power to make declarations in law²²⁰, the power to review decisions of local authorities on a de novo basis and the power to enforce the duties of the RMA through civil or criminal proceedings.²²¹ The power of de novo review elevates the Environment Court's power above

²¹³ Barczewski B, 'How well do environmental regulations work in Kenya? : A case study of the Thika highway improvement project' Centre for sustainable urban development (2013).

²¹⁴ Palmer G, Palmer K, *Local government law in New Zealand*, 2ed, Thomson Reuters, Wellington, 1993.

²¹⁵ International Union for the Conservation of Nature and Natural Resources, World Conservation Strategy: Living Resource Conservation for Sustainable Development (1980).

²¹⁶ The World Commission on Environment and Development, Our common future.

²¹⁷ Birdsong BC, 'Adjudicating sustainability: New Zealand's environmental court', 11.

²¹⁸ Warnock C, 'Reconceptualising the role of the New Zealand environment court'.

²¹⁹ Resource Management Amendment Act 2006 (NZ) This Act amended the 1991 Resource Management Act, and the Environmental Court replaced the former Planning Tribunal.

²²⁰ Section 310-313, Resource Management Act 1991.

²²¹ Section 314-321, Resource Management Act 1991.

that of an ordinary adjudicator as it vests it with the authority to set and implement New Zealand's environmental policy.²²² When the court exercises its power of de novo review, it becomes the primary decision maker and bears full responsibility for exercising discretion and for achieving the purpose in the RMA.²²³ The Court hears primary applications in some circumstances and it also hears appeals from decisions made by local authorities.²²⁴ Kenya's ELC is different in that it serves as a court of first instance. The Environment court does not have originating jurisdiction as cases are brought to it by parties.²²⁵ The court is empowered to confirm, amend or cancel regional and territorial planning instruments.²²⁶ It also has the express power to amend or alter subordinate legislation on the merits.²²⁷ This extended power of the court to hear appeals on a de novo basis; make declarations of law and to issue enforcement orders make the court very effective as enforcement is at the discretion of the court and not on local authorities.²²⁸ New Zealand's environment court is not a 'one-stop shop'. Some matters concerning land, water, and air fall within the jurisdiction of general courts, unlike the Kenyan ELC which is the forum for all matters concerning land use and policy and the environment.²²⁹

The RMA enacts a form of the sustainable development concept as the primary legislative purpose in Part 2 of the Act. The act provides that natural and physical resources must be managed in a way so as to enable the economic, social and cultural well-being of peoples and communities, while 'avoiding, remedying, or mitigating' any adverse effects on the environment.²³⁰ Part 2 of the RMA contains a list of principles relevant to sustainability which address preservation and protection of natural resources. Some of the principles listed include the protection of outstanding natural landscapes,²³¹ access to resources, such as the importance of public access to waterways,²³² or the relationship of Maori with their ancestral

²²² Birdsong BC, 'Adjudicating sustainability: New Zealand's environmental court', 34.

²²³ Wheen N, 'A response to the Minister's proposals for RMA reforms' 20 *Environmental Perspectives* (1998), 4-7.

²²⁴ Section 290, Resource Management Act 1991.

²²⁵ Section 276, Resource Management Act 1991.

²²⁶ Section 290, Resource Management Act 1991.

²²⁷ First Schedule Clause 14, Resource Management Act 1991.

²²⁸ Amirante D, 'Environmental courts in comparative perspective: Preliminary reflections on the National Green Tribunal of India' 29 *Pace Environmental Law Review* (2012).

²²⁹ Newhook L, Kirkpatrick D, Hassan J, "Issues with access to justice in the Environment Court of New Zealand" Environmental adjudication in the 21st century, Auckland, 11 April 2017 .

²³⁰ Section 5(2), Resource Management Act 1991.

²³¹ Section 6(b), Resource Management Act 1991.

²³² Section 6(d), Resource Management Act 1991.

lands, water, and sites.²³³ The Environment Court takes a significant role in construing the words and phrases in Part 2 of the RMA in making its decisions. The court in addition to using statutory interpretation mixed with facts employs policy ideas, opinion, discretion and philosophical references to determine the applications before it.²³⁴ Decision making of the court is subject to and should be in accordance with Part 2 of the RMA.²³⁵ The court crafts environmental and ecological phenomena into concepts that can be used in legal contexts.²³⁶

In the exercise of its jurisdiction, the court has the status and powers of an ordinary trial court²³⁷ and is not bound by procedural and evidentiary formalities that apply to judicial proceedings in other courts in New Zealand.²³⁸ The Environment Court has the power to set its own rules of procedure.²³⁹ In addition, the Court is authorised by the RMA to make declarations regarding the existence or extent of any power, function, right or duty provided by the RMA.²⁴⁰ This power is often invoked to obtain guidance on the division of authority between regional and territorial authorities and in determining whether certain acts by government authorities violate the general duty to avoid, remedy or mitigate adverse environmental effects.²⁴¹ The Court has the power to declare any inconsistencies between provisions in various policy statements and plans and whether any act or omission violates or is likely to contravene any rule in a plan or proposed plan.²⁴²

The Court's power to make declarations is discretionary and the court has in the past been willing to rule on uncontested issues where it had reason to believe the public interest warranted judicial interpretation.²⁴³ The Environment Court's broad power to make declarations allows it to make rulings on issues that may otherwise be beyond the scope of its reach in appeals and references. This declaration procedure also allows litigants to resolve disputes at an early stage and prevent the unnecessary use of resources.²⁴⁴

²³³ Section 6(e), Resource Management Act 1991.

²³⁴ Davis KC, 'An approach to the problems of evidence in the administrative process' 402 *Harvard Law Review* (1952).

²³⁵ *Auckland City Council v John Woolley Trust* (2008) NZRMA 260 (HC) [47].

²³⁶ *Winstone Aggregates Ltd v Franklin District Council* (NZEnvC Auckland A080/02, 17 April 2002).

²³⁷ Section 278, Resource Management Act 1991.

²³⁸ Section 276(2), Resource Management Act 1991.

²³⁹ Section 269, Resource Management Act 1991.

²⁴⁰ Section 310(a), Resource Management Act 1991.

²⁴¹ *Sayers v Western Bay of Plenty District Council* (1992) 2 NZ RMA 143.

²⁴² Section 301(b), Section 310(c), Resource Management Act 1991.

²⁴³ *Canterbury Frozen Meat Co Ltd* (1993)1 2 NZ RMA 282.

²⁴⁴ Birdsong BC, 'Adjudicating Sustainability: New Zealand's Environmental Court', 32.

The Environment Court has wide powers to issue enforcement orders under the RMA. “Persons may apply to the Court for an enforcement order to: enjoin a person from taking actions that contravene provisions of the RMA, regulations, rules in regional or district plans, or resource consents, enjoin a person from action that is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment,²⁴⁵ require a person affirmatively to act to ensure compliance with the RMA's provisions and instruments or to avoid, remedy, or mitigate adverse effects on the environment caused by or on behalf of that person and compensate others for reasonable costs associated with avoiding, remedying or mitigating effects caused by a person's failure to comply with one of several instruments, including rules in plans or resource consents.”²⁴⁶ This far-reaching authority to issue enforcement orders is a potentially powerful mechanism for enforcing duties that arise under the RMA, particularly the general duty to avoid, remedy or mitigate any adverse environmental effects of applicable plans.²⁴⁷ Issuance of an enforcement order lies upon the discretion of the court. Similarly, the ELC has the power to make orders and reliefs including, interim and preservation injunctions, prerogative orders, awards of damages, compensation, specific performance, restitution, declaration or costs.²⁴⁸

The Environment Court of New Zealand, in fulfilling its role in sustainability-based environmental decision-making, has developed an active case management system, and, in addition to adjudication through court hearings, uses a range of procedures including a court-annexed mediation service. The Court regards mediation and other forms of ADR as particularly well-suited to resolving environmental disputes and the court-annexed mediation service is now widely accepted as a valuable option. ADR procedures are often less expensive to the parties and take lesser time. Decisions arising from mediation procedures are often more sustainable. Indeed it may be argued that the use of such models of consensus-based decision-making is a cornerstone of sustainability.²⁴⁹

Under the RMA, the New Zealand Environment Court has considerable flexibility to regulate its own proceedings. This flexibility, subject to concepts of natural justice and

²⁴⁵ Section 314(1) (a)(ii), Resource Management Act, 1991.

²⁴⁶ Section 314, Section 316, Resource Management Act, 1991.

²⁴⁷ Section 316, Resource Management Act, 1991.

²⁴⁸ Section 13 (7), Environment and Land Court Act (No. 19 of 2011).

²⁴⁹ Oliver M, “Implementing sustainability – New Zealand’s environment court-annexed mediation” Indian Society of International Law (ISIL) Fifth International Conference on International Environmental Law, New Delhi, India, 8 - 9 December 2007.

reasonableness, enables the Court to respond readily to the variety and complexity of the cases that come before it by providing a range of dispute resolution techniques and procedures without requiring further legislative amendments. Implementing sustainability is a complex challenge that requires a suite of measures and tools to achieve. The practical experience of the New Zealand Environment Court, and in particular its Court-annexed mediation service, is relevant to Kenya in seeking the development of mechanisms to facilitate the prevention and peaceful settlement of environmental disputes such as pollution.²⁵⁰

2.3 Conclusion

This Chapter outlines New Zealand's experience in implementing sustainability. It compares Kenya's courts to New Zealand's Environmental Court. A fundamental practical lesson to be learned from the New Zealand experience is the incorporation of sustainable development in both legislation and the judicial process. Though Kenya mentions sustainable development principles in its laws, it is yet to infuse and incorporate the principles in interpreting and implementation of the law. It is the incorporation of these principles that promote environmental justice in combatting industrial pollution and attainment of sustainable development.

²⁵⁰ Oliver M, 'Implementing sustainability – New Zealand's environment court-annexed mediation'.

CHAPTER FIVE

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

This chapter focuses on the findings and recommendations that the study has been able to come up with.

In Chapter One we examined the concepts that are central to this study. These include environment, environmental management, sustainable development, environmental rights, and duties. The major aim of this chapter was to understand the role that the court can play in combatting industrial pollution and attaining sustainable development. The chapter introduced the concept of sustainable development and linked it to development. This analysis led to the conclusion that the court has an important role to play in combatting industrial pollution and attaining sustainable development.

Chapter Two analysed two theories, the public trust theory and the theory of justice and fairness. The Chapter found that the public trust theory can play an important role in ensuring judicial review of actions that threaten natural resources and the environment where an environmental statute does not apply or is not being enforced, or where state constitutional provisions to protect natural resources do not exist or are ineffective. On the theory of justice, the research found that the theory places a big task in distributing justice through decisions they make. Judges can, however, use the hypothetical veil of ignorance to decide cases fairly. By so doing, the judiciary is collectively able to combat issues such as industrial pollution and climate change and attain sustainable development.

Chapter Three was an analysis of the legal and regulatory framework governing courts and sustainable development. The study established that Kenya has an environmental regulatory framework that is keen on ensuring the protection, conservation, preservation and effective management of the environment, however, industrial pollution is still persistent in the country. The study, therefore, finds the current regulatory framework is not adequately implemented and enforced.

Chapter Four was a comparative analysis of the Environment Court of New Zealand and the Environment and Land Court of Kenya. The study found out that New Zealand incorporated principles of sustainable development in its regulation and decision-making process which

has gone a long way in ensuring environmental justice and sustainable development in the country.

5.2 Conclusions

From these discussions, it is evident that Kenya needs to combat industrial pollution in order to achieve sustainable development. The study concludes that the court is a relevant player in curbing industrial pollution to attain sustainable development. In addition, strict enforcement of legislation and regulations is necessary.

Kenyan courts have barely been litigious on environmental matters.²⁵¹ Kenya can learn from New Zealand's approach to environmental protection by emphasising on the incorporation of sustainable development as a key principle in legislation and judicial law making.

Judges cannot replace the legislative and executive branches of government, who are in charge, respectively, of the creation of environmental laws and regulations, and of their administrative implementation.²⁵² The optimal implementation of environmental law ought to rest on a balance between comprehensive legislation, active administration, and vigilant jurisdiction. Enforcement of environmental rights and laws is paramount to the creation of new laws.²⁵³ In relation to industrial pollution, although the courts play a secondary role, it is vital in enforcing compliance rules and standards. Courts are final arbiters of actions to enforce environmental laws they can be instrumental in promoting compliance. Courts also are often given the role of reviewing the legality of decisions made by administrative agencies. Thus, the judiciary has a crucial and unique role in the management of pollution ensuring that it operates under the rule of law.²⁵⁴

One of the objects of the judiciary is to clear out all social, political and national maladies of the country where the executive has failed to perform its duties in order to give justice to a society. The role of the judiciary is to protect the public interest against the misuse of power

²⁵¹ Odhiambo M, 'The role of courts in environmental management: The case of Kenya' LLM Thesis, The University of Nairobi, July 2003.

²⁵² Sadeleer ND, *Environmental principles: From political slogans to legal rules*, Oxford University Press, Oxford, 2002.

²⁵³ Amirante D, 'Environmental courts in comparative perspective: Preliminary reflections on the National Green Tribunal of India'.

²⁵⁴ <http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/2443511279901011064/GuidanceNoteonRoleofJudiciary.pdf> on 18th January 2018.

by public authorities. The judiciary is critical in ensuring the implementation of principles of the rule of law and in keeping the public institutions and individuals in check.

5.3 Recommendations

The study makes a number of recommendations to address the challenge of industrial pollution. The recommendations act as a possible measure to attain sustainable development by combatting industrial pollution. They are drawn from the findings of the study and the analysis of New Zealand's environmental court.

- a) Kenya can increase the scope of the ELC's powers to make declarations on ruling on uncontested issues that are of public interest. The judiciary would thus play an active role in pollution control, encouraging public interest litigation on environmental matters.
- b) Sustainable development should be emphasised and prioritised as a guiding principle to the courts and legislators. Incorporating sustainable development principles in the entire judicial process would lead to sustainable development and sustainable management of resources.
- c) Kenya should also adopt a court-annexed mediation service such as New Zealand, as the use of such models of consensus-based decision making is a cornerstone of sustainability. Adoption of ADR in environmental cases narrows down issues in dispute, reducing hearing time and costs to all parties involved. Even if a matter is not fully capable of resolution by ADR, some aspects of it can get resolved through the process.
- d) The ELC should also evolve the burden of proof in environmental cases thus the onus should be on an actor/industrialist to prove that his action is environmentally friendly and that there are no certain and negligible risks to the environment.
- e) The judiciary should introduce mandatory evaluation procedures for courts where independent boards and user groups monitor the performance of the courts and user satisfaction. This will increase transparency and improve workings of courts.
- f) Lastly, the judiciary needs reforms. As has been the case, some of the ELC judges are not skilled and experienced in matters environment and land. Personnel in the ELCs should be skilled and trained. Personnel planning is needed to improve access to justice and uphold public confidence.

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